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Ade & Company  
1700 360 Main Street  
Winnipeg, R3C 3Z3  
CANADA

EXAMINER

WANG, SHENGJUN

ART UNIT

PAPER NUMBER

1617

DATE MAILED: 06/04/2003

18

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/762,232

Applicant(s)

MIGNAULT, LORRAINE

Examiner

Shengjun Wang

Art Unit

1617

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 26 February 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1,2,5-9 and 17-30 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2,5-9 and 17-30 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_ 6) ☐ Other: \_\_\_\_\_

### DETAILED ACTION

Receipt of applicants' amendments and remarks submitted February 26, 2003 is acknowledged.

#### *Claim Rejections 35 U.S.C. 103*

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1, 2, 5-9, 17-22, 24-30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Weed (of record) in view of Puchalski, Jr. et al. (of record) and Jakobson et al. (of record) for reasons set forth in the prior office action.
3. As stated in the prior office actions, Weed teaches hot water extraction of oatstraw (see page 205). The extracts are in the form of oatstraw baths. Weed states "use an oatstraw footbath to soak away stink, sweat, cold, and pain from your tender tootsies," (page 205). For purposes of examination, water as disclosed by Weed is considered to be equivalent to "filtered and magnetized water" as claimed in claim 2. Weed teaches the use of aqueous extracts of oatstraw applied externally to treat pain from any internal distress, including uterine pain. For purposes of examination, uterine pain is considered to meet the limitation of menstrual cramps. Weed also teaches the use of the extract for treating skin diseases, flaky or dry skin, wound, and eye irritations. A bath composition meets the limitation of body wash. The reference lack addition of

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glycerin and lavender oil, as well as weight percentages of the same and teaching of a process for preparing a composition by addition of the components.

4. Puchalski teaches shampoo and bath and shower gels. Puchalski teaches that a polyol to enhance skin feel may be present in the compositions, including glycerin (see col. 3, lines 22-32). Jakobson teaches the addition of oils such as lavender oil in order to impart a medicinal activity to the composition in that the oil exert a relieving or healing action on the human body and/or exhibit a therapeutical activity by means of relaxing, refreshing, or vitalizing effect.

5. With respect to the weight percentages of the components, differences in concentration will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration is critical. Where the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable range by routine experimentation. In re Aller 220 F.2d 454, 105 USPQ 233, 235 (CCPA 1955). With respect to the claimed process for preparing the composition, the process involves combining the recited components. It is the position of the examiner that a process for preparing a composition which merely the process of combining the components is render obvious by the composition itself.

6. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the composition of Weed by the addition of glycerin in order to benefit from the enhanced skin feel imparted by glycerin as taught by Puchalski and by the addition of lavender oil in order to benefit from the relieving or healing action of lavender oil as taught by Jacobson.

***Response to the Arguments***

Applicants' amendments and remarks submitted February 26, 2003 have been fully considered, but are not persuasive with respect to the rejection set forth above for reasons discussed below.

Applicants argue that there is ~~more~~<sup>No</sup> suggestion or motivation to combine the cited references to reach the claimed invention. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the teaching, suggestion, and motivation are found both in the cited reference and in the knowledge generally available to one of ordinary skill in the art. Particularly, Weed teaches the usefulness of oatstraw water extract for topical application, for soothing pain, inflammation, and various healthy benefits. Puchalski et al. teaches the usefulness of glycerin in topical application. Jakobson teaches lavender oil is useful in bath additive for relieving or healing action on the human body and/or exhibit a therapeutical activity by means of relaxing, refreshing, or vitalizing effect. It is prima facie obvious to combine two or more ingredients each of which is taught in the prior art to be useful for same purpose in order to form third composition that is to be used for very the same purpose (herein topical application, e.g., bath); idea of combining them flows logically from their having been individually taught in prior art; thus, the claimed invention which is a combination known

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ingredeints of topical application sets forth prima facie obvious subject matter. See In re Kerkhoven, 205 USPQ 1069. As to the particularly combination herein, note the employment of the particular emollient (glycerin), and oil (lavender oil) is seen to be a selection from amongst equally suitable material and as such obvious. Ex parte Winters 11 USPQ 2<sup>nd</sup> 1387 (at 1388). In summary, Weed teaches the beneficial properties of oatstraw (see the entire document of Weed), therefore, employ oatstraw water extract with other well-known topical, beneficial ingredients in a well-known topical application form, and the method of using the same is obvious to one of ordinary skill in the art. Further, Weed provides no teaching or suggestion that the particular method disclosed therein is the only method for employ oatstraw. One of ordinary skill in the art would understand that oatstraw contains beneficial ingredients, and would have been motivated to employ oatstraw in method other than those expressly disclosed by Weed.

Regarding the remarks about “filtering,” note it would have been obvious to one f ordinary skill in the art at the time the invention was made, that most of the active ingredients of oatstraw would have been extracted into water when “extracted with boiled water.” Therefore, using water extract only by filtering out the residues is an obvious alternative of keeping the residue in the water extract, especially when a commercial extract is made. Weed does not teach against filtering. What Weed taught is a particularly situation, wherein the extract is made *in situ*.

7. In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., “tap water”) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Applicants appears to argue that tap

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water (a solution of minerals) magnetized, and those deionized are different. The claims are drawn to employment of "water," or "magnetized water" The examiner has not been convinced that "magnetized water" and water would be any different for lacking of scientific evidence. The examiner fails to understand how the molecules of water, or their arrangement would be affected by magnet.

8. Nothing unobvious is seen in the claimed invention.

9. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Shengjun Wang, Ph.D. whose telephone number is (703) 308-4554. The examiner can normally be reached on Monday-Friday from 8:30 to 5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan, can be reached on (703) 305-1877. The fax phone number for the organization where this application or proceeding is assigned is (703) 308-4556.

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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.

Patent Examiner WANG  
SHENGJUN WANG  
PATENT EXAMINER

Shengjun Wang

May 23, 2003